IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 177 of 2007
(Old No.1723/1989)

1- Dhanesh Kumar s/o Shri Vishambhar Dutt, r/o Village Bainsoli Malli, Patti Lamaridhar, P. S. Anjali Serh, District Tehri Garhwal
2- Sunder Lal s/o Vidya Dutt, r/o Village Kaitholi, Patti Lamaridhar, P. S. Anjali Serh, District Tehri Garhwal

...Appellants

Vs.

State of U.P. .....Respondent

Sri Lokendra Dobhal, Advocate, for the appellants,.
Learned A.G.A. for the respondent.

Dated November 22, 2007

Hon'ble B. C. Kandpal, J.

This criminal appeal has been preferred against the judgment and order dated 2.8.1989 passed by District & Sessions Judge, Tehri Garhwal in Sessions Trial No. 29 of 1988, State vs. Dhanesh Kumar and Sunder Lal, thereby convicting the appellant Sunder Lal u/s 457 I.P.C. awarding sentence of one year R.I. and appellant Dhanesh Kumar u/s 457 and 376 I.P.C. for the sentence of one year and 7 year R.I. respectively.

Briefly stated the prosecution case is that Manmathan (PW-2) has been running Bhuvneshwari Mahila Ashram at Anjanisain, District Tehri Garhwal for 18 years. He is founder and Secretary of this Ashram in which unemployed

women and orphan children reside. Sulochna PW-1 and Pramila PW-4 are residing in this Ashram. He appointed Dhanesh accused as Supervisor to train these women and orphan children. Sunder Lal accused was also serving in the said Ashram and was removed from service by Swami Manmathan (PW-2). He lodged a report of theft against the accused Dhanesh in December, 1987 in which he was arrested. On 11.1.1988 at about 5 p.m., accused armed with a Khukri and a danda arrived in the inspection house of the Ashram and demanded stipend. Swami Manmathan told that his salary has already been given to his father. After half an hour, accused Dhanesh arrived and threatened Swami Manmathan to see. On feeling danger from accused Dhanesh, Swami Manmathan retired to his office room instead of bed room. On 11/12.1.88 accused Dhanesh and Sunder Lal arrived in the room of Gaushala where Sulochna PW-1 was sleeping. Accused Dhanesh got the door unlocked saying that she was his neice. Then he made search for Swami Manmathan. After a while, he went to Sulochna to return her torch. He took her to the upper building to search for Swami Manmathan. He, Sulochna, Pramila and accused Sunder Lal went to the room above the gaushala. Sunder Lal and Pramila remained outside the door of the room. Sulochana unlocked the rooms. Then accused Dhanesh took Sulochna to the third room of the Ashram and locked it. Accused Dhanesh committed rape on Sulochana PW-1. On 12.1.88 in the early morning of about 5 or 6 a.m., Sulochna went to Swami Manmathan and narrated the aforesaid incident to him. Then Swami Manmathna (PW-2) dictated report Ext. Ka-1 to his clerk and

lodged the same at Patwari Outpost Anjanisain on 12.1.88 at about 8 a.m. Patwari Indra Dutt Dangwal (PW-3) wrote F.I.R. Ext. Ka-3 on the basis of report Ext. Ka-1 and made necessary entry Ext. Ka-4 in the General Diary. He started investigation of this case. He recorded the statement of Swami Manmathan (PW-2) and proceeded to the spot. He inspected the site and prepared site plan Ext. Ka-5. He took into possession the pieces of door Ext. 2 for which he wrote memo Ext. Ka-6. He recorded the statement of Sulochna Devi and took her petticoat Ext. 1 in his possession. He sealed this petticoat and wrote memo Ext. Ka-7.

The Investigating Office after completion of investigation submitted charge sheet Ext. Ka-9 against the accused persons.

The prosecution in support of its case examined PW-1 Smt. Sulochna, prosecutrix, PW-2 Swami Manmathan, PW-3 Dr. Bina Rana, who had medically examined the prosecutrix, PW-4 Km. Pramila, P.W.-5 Indra Dutt Dangwal, Investigating Officer of the case.

The accused in their statements under Section 313 of Cr.P.C. have denied the prosecution case and alleged that they have been implicated at the instance of Swami Manmathan.

The Sessions Judge after considering the evidence and having heard counsel for the parties, convicted accused Sunder Lal under Section 457 of I.P.C. and awarded one year's R.I. The accused Dhanesh (since deceased) was convicted under

Sections 457 and 376 of I.P.C. and was awarded sentence of one year's R.I. and 7 years' R.I. respectively.

Feeling aggrieved, both the accused/appellants have preferred this appeal before this Court.

Accused/appellant, Dhanesh has died long back on 21.12.1993 as is indicated by Village Pradhan, Jakhanidhaar, forwarded by Tehsildar. Therefore, the appeal filed by the appellant-Dhanesh stands abated.

Heard learned counsel for the appellant-Sunder Lal, learned A.G.A. and perused the record.

Learned counsel for the accused/appellant has submitted that the learned Sessions Judge has recorded contrary finding of the evidence adduced before it. The finding of conviction is based on surmises and conjectures. The trial court also failed to consider the defence version raised before it. Therefore, the accused/appellant is liable to be acquitted.

On the other hand, learned A.G.A. has submitted that the prosecutrix PW-1 Smt. Sulochna, PW-2 Swami Manmathan and PW-4 Km. Pramila have deposed against the accused about the commission of the crime. All these witnesses have corroborated each other and the learned Sessions Judge has rightly convicted the accused/appellants.

In order to consider the submissions of the learned counsel for the parties, it is necessary to go through the deposition of the prosecution witnesses.

PW-1 Smt. Sulochna has stated in her statement on oath that on 11/12.1.1988 at about 2 a.m. at the Gaushala of the Ashram along with Pramila PW-4, Nirmala and Sardama. Accused Dhanesh and Sunder Lal knocked at the door and asked her to open it, saying that she has concealed Swami Manmathan. On her refusal, they threatened to break open the door. The accused Dhanesh told her that she was his niece. At this, she opened the door and made the light on. Dhanesh entered the room and Sunder Lal remained standing outside. Accused Dhanesh flashed his torch and made search of the Swami Manmathan, but all in vain and went out of the room. Then she locked the door. After 15 or 20 minutes, accused returned back. Accused Dhanesh entered the room armed with Khukri and danda. He asked this witness and Km. Pramila to accompany him and went to the upper building of the Ashram. Accused Sunder Lal was having a lathi. They searched the while Ashram. This witness has stated that accused Dhanesh committed rape on her inside third room when she reached there and accused bolted the door from inside. She also alleged that the accused had Khukri in his hand and he threatened her to kill if she objected to his wishes of commission of the rape upon her. She also alleged that her petticoat material Ext. Ka-1 was seized by the Investigation Officer, which she was wearing at the time of the incident. This witness was cross examined by the accused persons, but nothing material has been

brought out form her statement which may render the prosecution case to be false and concocted.

PW-4 Km. Pramila has fully corroborated the statement of this witness (PW-1) pertaining to the manner in which the incident had happened. She has alleged that the accused Dhanesh had shown his Khukri to her and at this she was afraid of him and came out along with Sulochna (PW-1). They saw accused Sunder Lal standing by the side of the Rasta. Accused Dhanesh opened the rooms but Swami Manmathan was not there. Thereafter, he thrown Sulochna inside the third room and bolted the room from inside. After some time, Sulochna cried out. At this, accused Sunder Lal caught hold her also, but she anyhow escaped and went towards Gaushala. There she raised alarm, but no one came there for her help. This witness also stated that she had also bolted the door of the room from outside where Sulochna and Dhanesh had gone. She further stated that when in the next morning she opened the bolt of the door, accused Dhanesh and Sulochna came out. Smt. Sulochna was weeping and she told about the commission of rape upon her by accused Dhanesh. No reason has been assigned to this witness as to why she will falsely implicate the accused in the crime.

PW-2 Swami Manmathan has deposed that on 11.1.1988 accused Dhanesh armed with Khukri and danda came to him and demanded his salary. He apprehended danger at the hands of this accused. Hence he shifted to his office room and slept there. At about 1 a.m. he heard noise of lathi and he opened the door and saw that Dhanesh and

Sunder Lal were wondering around his sleeping room of the inspection house. He also stated that both these accused persons went inside the Ashram. He heard noise there. In the next morning, he saw both the accused persons going from the Ashram. He also stated that Smt. Sulochna told him about the committing the rape upon her by accused Dhanesh. This witness is the reporter of the case. According to him, at the saying of Smt. Sulochna he lodged report Ext. Ka-1 at the Patwari Circle.

From the above statements of the witnesses, it is quite clear that the accused Dhanesh and Sunder Lal armed with lathis and Khukri, had reached the Ashram and made search Swami Manmathan. They entered the rooms of the Ashram at night. Accused Dhanesh also committed rape upon Smt. Sulochna.

The medical evidence in this case fully supports the ocular version. Smt. Sulochna was medically examined by Dr. Bina Rana PW-3 on 13.1.1988 at Combined Hospital, Tehri. According to her, there was no external mark of injury on the person of the prosecutrix. This witness has opined that Smt. Sulochna was habitual in sexual intercourse. This witness could not give exact opinion about the commission of rape upon Smt. Sulochna. The petticoat of the prosecutrix was sent for pathological examination. According to pathology report Ext. Ka-10, the petticoat of the prosecutrix was having human semen and spermatozoa.

Admittedly, Smt. Sulochna was a married woman and she would have been habitual in sexual intercourse. It has come in evidence that Smt.

Sulochna was married about 8 years ago from the date of incident and she has also given birth to a female child, but she had no concern with her husband from the year 1985 and she was having shelter in the Ashram at the time of the incident. Therefore, the medical evidence cannot be said to be contrary to the facts of the prosecution case. the doctor has opined that she was habitual in co-habitation and no definite opinion abut the rape was given, but from the pathology report Ext. Ka-10 it has been established that she was subjected to rape as petticoat was having human semen and spermatozoa.

As stated earlier, accused/appellant Dhanesh has died during the pendency of the appeal and case has abated against him. Now there remains accused/appellant, Sunder Lal. From the evidence of the witnesses stated above, this accused was accompanying accused Dhanesh at the time of the commission of the crime. It has come in evidence that he was having lathi in his hand and he also made search of Swami Manmathan by breaking open the doors of the rooms of the Ashram, thereby committed an ofence of house trespass by night entering into the building of Mahila Ashram, used as a human dwelling, after the hour of sunset in order to commit the assault on Swami Manmathan and rape upon Smt. Sulochna.

I have gone through the finding recorded by the trial court and I do not find any infirmity and illegality in it. The prosecution has been successful to establish its case against the accused/appellant, Sunder Lal under Section 457 of I.P.C. beyond all

reasonable doubt. Therefore, the appeal filed on behalf of the accused-appellant Sunder Lal has no merits and deserves to be dismissed.

So far as the sentence awarded to the appellant-Sunder Lal is concerned, learned defence counsel urged that the appellant-Sunder Lal has already undergone in jail for a period of about one month, and looking to the year of accident, the appellant be sentenced to the period of already undergone by him and to a suitable fine.

I have considered the submission and I am of the view that in the interest of justice it is not desirable to send the appellant-Sunder Lal to jail again as the offence relates to the year 1988 and the accused/appellant has already undergone in jail about one month in connection with the case.

The appeal is accordingly dismissed.

However, the sentence awarded to the accused/appellant Sunder Lal under Section 457 of I.P.C. is reduced to the period of already undergone by him in place of one year R.I. as awarded to him by the trial court and to pay a fine of Rs. 5,000/-. The fine so imposed against the appellant-Sunder Lal shall be deposited by him before the court concerned within 45 days from the date of receiving of the certified copy of this judgment. In case if the accused/appellant Sunder Lal does not deposit the amount of fine imposed by this Court, he will have to serve out the sentence imposed against him by the trial court. The impugned judgment and order of

the trial court, so far as the sentence part is concerned, stands modified accordingly.

Let the record of trial court be transmitted back for compliance.

(B.C. Kandpal, J.)

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